IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

JIMMY RAY PLAINTIFF

V. NO. 2:98CV33-B-B

TRAVELERS INSURANCE COMPANY
AND DEBORAH POWELL, AS AGENT,
SERVANT AND EMPLOYEE OF
TRAVELERS INSURANCE COMPANY
DEFENDANTS

MEMORANDUM OPINION

This cause comes before the court on the plaintiff's motion to remand. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

This cause was removed on the ground of diversity jurisdiction. The notice of removal alleges that defendant Deborah Powell, a nondiverse insurance adjuster, was fraudulently joined. If fraudulently joined, Powell's citizenship is not considered in determining whether diversity of citizenship exists. Jernigan v. Ashland Oil, Inc., 989 F.2d 812, 815 (5th Cir. 1993), cert. denied, 510 U.S. 868, 126 L. Ed. 2d 150 (1993). The removing party carries a heavy burden in establishing fraudulent joinder and must demonstrate it by clear and convincing evidence. Jernigan, 989 F.2d at 815; B., Inc. v. Miller Brewing Co., 663 F.2d 545, 549 (5th Cir. 1981). Fraudulent joinder may be established by showing outright fraud in the plaintiff's pleading of jurisdictional facts. Jernigan, 989 F.2d at 815; B., Inc., 663 F.2d at 549. In addition, "a joinder is fraudulent if the facts asserted with respect to the resident defendant are shown to be so clearly false as to demonstrate that no factual basis existed for any honest belief on the part of the

plaintiff that there was joint liability." Bolivar v. R & H Oil & Gas Co., 789 F. Supp. 1374, 1376-77 (S.D. Miss. 1991). Fraudulent joinder may also be established as follows:

> To prove their allegation of fraudulent joinder [removing parties] must demonstrate that there is no possibility that [plaintiff] would be able to establish a cause of action against them in state court. In evaluating fraudulent joinder claims, we must initially resolve all disputed questions of fact and all ambiguities in the controlling state law in favor of the non-removing party. We are then to determine whether that party has any possibility of recovery against the party whose joinder is questioned.

Dodson v. Spiliada Maritime Corp., 951 F.2d 40, 42 (5th Cir. 1992). See Laughlin v. The Prudential Ins. Co., 882 F.2d 187, 190 (5th Cir. 1989) ("the court may find fraudulent joinder only if it concludes that the Plaintiff has no possibility of establishing a valid cause of action against the in-state defendant").

The notice of removal alleges that "there exists no possibility that the Complaint states a valid cause of action against [Powell]." The plaintiff made a claim for an alleged work-related hernia under his employer's workers' compensation policy issued by defendant Travelers Insurance Company [Travelers]. The complaint alleges bad faith denial of the plaintiff's workers' compensation claim, breach of fiduciary duties and failure to promptly and adequately investigate the claim. The plaintiff seeks remand, *inter alia*, on the ground that Powell may be liable for her personal participation and conduct in failing to promptly and adequately investigate the plaintiff's claim. It is undisputed that an insurance adjuster cannot be held individually liable for simple negligence in adjusting a claim but is not absolutely immune from tortious liability. Bass v. California Life Ins. Co., 581 So. 2d 1087, 1090 (Miss. 1991). In Bass, the Mississippi Supreme Court adopted a standard of "'gross negligence, malice, or reckless disregard for the rights of the insured'" to impose tort liability on insurance "adjusters, agents or other similar entities." 581 So.

2d at 1090 (quoting Dunn v. State Farm Fire & Cas. Co., 711 F. Supp. 1359, 1361) N.D. Miss. 1987)).

The defendants contend that only evidence of conduct which rises to the level of an intentional tort and is independent of the accident compensable under the workers' compensation scheme can circumvent the exclusive remedies under the Mississippi Workers' Compensation Law, Miss. Code Ann. § 71-3-9.[1] See Rogers v. Hartford Accident & Indemn. Co., 133 F.3d 309, 312 & n.6 (5th Cir. 1998) (construing Mississippi law) (in order to be recoverable, a workers' compensation claim must constitute "a willful and intentional or malicious wrong"). The defendants further contend that the plaintiff has failed to allege a set of facts which would support a claim that Powell engaged in a deliberate design to frustrate the plaintiff's rights. The Workers' Compensation Act provides an exclusive remedy of compensation for injuries arising out of and in the course of employment; it "did not contemplate the commission of an independent tort." Southern Farm Bureau Cas. Ins. v. Holland, 469 So. 2d 55, 57-58 (Miss. 1984). Clearly, simple negligence does not constitute an independent tort for purposes of maintaining an action outside the Workers' Compensation Act. However, the Mississippi Supreme Court's rationale, discussed *infra*, indicates that the so-called intentional tort exception to the exclusive remedy provision encompasses gross negligence.

The Mississippi Supreme Court has held that a bad faith cause of action against an employer or insurance carrier is not barred by the exclusive remedy provision. Luckett v. Mississippi Wood, Inc., 481 So. 2d 288, 290 (Miss. 1985); Holland, 469 So. 2d at 58-59. Under

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[1]The exclusivity of remedy provision, § 71-3-9, provides: "The liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee...on account of such injury or death...."

Mississippi law, an insurer's bad faith has been defined as acting with malice, or gross negligence or reckless disregard for the rights of others. Caldwell v. Alfa Ins. Co., 686 So. 2d 1092, 1095 (Miss. 1996) (citations omitted). In Luckett and Holland the court construed claims of bad faith denial of workers' compensation claims as the equivalent of an intentional tort. Luckett, 481 So. 2d at 289, 291 (bad faith refusal claim "sounding of intentional, tortious conduct"); Holland, 469 So. 2d at 57, 59 ("the independent and allegedly intentional, tortious conduct of Farm Bureau in refusing to pay benefits owing under the Act without an arguable basis"; the complaint alleged acts committed with "grossness and recklessness")). The Bass standard applicable to adjusters and other insurance employees is the same as the bad faith standard applicable to insurers, and in adopting a standard requiring, at a minimum, gross negligence, the court in Bass reasoned: "Jurisprudence should not be in the position of approving a **deliberate** wrong." 581 So. 2d at 1090 (emphasis added).

The complaint in this cause alleges that "Defendants wilfully and maliciously failed to promptly and adequately investigate plaintiff's workers compensation claim." The complaint seeks punitive damages from both Travelers and Powell on the grounds that the "Defendant [sic] have **intentionally wronged** plaintiff or have treated plaintiff with **such gross and reckless negligence as is equivalent to such a wrong**." (Emphasis added.) It appears to the court that the complaint states a possible claim against Powell that is not barred under the Mississippi Workers' Compensation Act. In the alternative, the defendants contend that there is no possibility that the plaintiff can **prove** that Powell's actions rise to the level of an intentional tort or even constitute gross negligence. The Fifth Circuit has held:

> A district court need not and should not conduct a full scale evidentiary hearing on questions of fact affecting the ultimate

> issues of substantive liability in a case in order to make a preliminary determination as to the existence of subject matter jurisdiction. The question of whether the plaintiff has set forth a valid claim against the in-state defendant(s) should be capable of summary determination.

B., Inc. v. Miller Brewing Co., 663 F.2d at 551. The court may pierce the pleadings and consider summary judgment evidence in determining whether the removing defendants have demonstrated fraudulent joinder. Carriere v. Sears, Roebuck & Co., 893 F.2d 98, 100 (5th Cir.), cert. denied, 498 U.S. 817, 112 L. Ed. 2d 35 (1990).

"Mississippi law does indeed impose a duty upon the insurance company to promptly and fully investigate any claim." Life & Cas. Ins. Co. v. Bristow, 529 So. 2d 620, 623 (Miss. 1988), cert. denied, 488 U.S. 1009, 102 L. Ed. 2d 785 (1989). The insurer must, at a minimum, "make reasonable efforts to obtain all available medical information relevant to the claim." Id. (citations omitted). See, e.g., Life Ins. Co. v. Allen, 518 So. 2d 1189, 1193 (Miss. 1987 ("Making [the insurer's] conduct more egregious, claims adjuster Covey didn't even bother to check with Dr. Nix or any other physician before denying the claim."); Bankers Life and Cas. Co. v. Crenshaw, 483 So. 2d 254, 272 (Miss. 1985) ("Proper investigation in this case meant the obtaining of all available medical information relevant to Crenshaw's claim."). Under Bass an adjuster may be individually liable for his personal participation and conduct in the investigation of a claim resulting in the denial of the claim. 581 So. 2d at 1090 (determining the standard of care to be applied to insurance "adjusters, agents or other similar entities"). See Ironworks Unlimited v. Purvis, 798 F. Supp. 1261, 1265 (S.D. Miss. 1992) (the Bass ruling adopted the Dunn standard for "insurance company employees and/or agents **that are sued for their involvement in the**

denial of a claim for benefits") (emphasis added).[2]

It is undisputed that Powell, in her capacity as an insurance adjuster, was assigned the investigation of the plaintiff's claim. The complaint alleges failure to interview the plaintiff's attending and treating physicians to determine the cause of the plaintiff's hernia and to obtain copies of the plaintiff's medical records. Defendant Powell investigated the plaintiff's claim and signed the letter giving the plaintiff notice of denial of the claim. The claim was denied on the ground that the plaintiff's hernia was not compensable under the hernia statute of the Workers' Compensation Act, Miss. Code Ann. § 71-3-23(c) (requiring proof "[t]hat there has been no descent or protrusion of the hernia or rupture prior to the accident for which compensation is claimed"). Having held a hearing on the plaintiff's petition to controvert, an administrative judge held that the plaintiff's hernia was compensable under the hernia statute and awarded workers' compensation benefits and statutory penalties to the plaintiff. The Mississippi Workers' Compensation Commission affirmed the ruling.

Powell's affidavit states that the plaintiff indicated in his recorded statement that he had noticed a preexisting "knot." According to the affidavits of Powell and her supervisor, Chris Malone, the decision to deny the plaintiff's claim was exclusively based on the plaintiff's statement. It is undisputed that Powell neither obtained the plaintiff's medical records nor

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[2]The Mississippi Supreme Court approved and adopted the following conclusion of law set forth in Dunn v. State Farm Fire & Cas. Co., 711 F. Supp. 1359, 1361 (N.D. Miss. 1987) as follows:

> **An adjuster** has a duty to investigate all relevant information and must make a realistic evaluation of a claim. Banker's Life & Casualty Co. v. Crenshaw, 483 So. 2d 254, 272, 276 (Miss. 1985) [insurer's "**executive personnel**...unquestionably knew **their duty** under the law to properly investigate any claim"].

Bass v. California Life Ins. Co., 581 So. 2d 1087, 1090 (Miss. 1991) (emphasis added).

interviewed the plaintiff's two physicians. The defendants contend that the plaintiff's claim would have been denied even if the medical records had been considered in the investigation and that the rulings of the administrative judge and Commission are contrary to the applicable law. In the alternative, the defendants contend that, at most, Powell's interpretation of the hernia statute constitutes simple negligence. Powell never requested or received a medical or legal opinion on the compensability of the plaintiff's hernia claim. Resolving all uncertainties or ambiguities in the controlling state law and all questions of fact in favor of the plaintiff, the court finds that Powell's decision to rely on the plaintiff's reference to a preexisting "knot," to the exclusion of **any** medical information via records or physicians, provides a factual basis for possible liability on the part of Powell under Mississippi law. See Crenshaw, 483 So. 2d at 272 ("under any standard of prudent medical practice, it is foolhardy to attempt to make a diagnosis on [even] incomplete medical records"). Of course, the court is making no factual finding as to whether Powell's actions rise to the level of malice or even negligence -- a question that will be answered by the state court.

Since Powell was not fraudulently joined, his nondiverse citizenship defeats diversity jurisdiction. Accordingly, the instant motion to remand should be granted. An order consistent with this opinion will issue.

THIS, the _____ day of June, 1998.

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NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE